(ii) that he was present when the testatrix executed her Will on November 16, 1965;

(iii) that after the testatrix's death, Mansor, the defendant and he had a discussion on the Will which was shown to Mansor.

(iv) that Mansor advised the defendant to transfer the said property to the defendant's name as soon as possible as he was afraid that if he were to die before the said property was transferred to the defendant's name "the matter might become complicated but he did not elaborate on same";

(v) that after the Grant of Probate was issued to the defendant she proceeded to have the said property transferred to her name by way of Deed of Assent;

(vi) that the defendant showed the Deed of Assent to Mansor in his presence and Mansor "was satisfied that the transfer of the said property to my mother's name had been completed";

(vii) that Mansor up to the time of his death did not change his mind with regard to the testatrix's Will nor did he object to the testatrix bequeathing all her property to the defendant nor to the transfer of the said property to the defendant's name.

I have to weigh this evidence of Abdullah with great care. It would appear that at the discussion in 1965 Mansor did not specifically give his consent, he merely "did not object to the wishes of the testatrix". It would also appear that Mansor was overjoyed over the whole matter. It was he who advised the defendant to have the said property transferred to her name or "the matter might become complicated".

It is not disputed that Mansor was a poor, sickly old man. It is inconceivable that he was happy that his mother should give all her property to one person, the defendant, when he had four children and an old wife to support. If at all Mansor did consent and was happy about it, surely the defendant would have got the written consent of Mansor.

On the balance of probabilities I find that Mansor did not consent.

Order accordingly.

Solicitors: *H.A. Jalil & Associates; Kamil & Co.*

GOMEZ NEE DAVID v. GOMEZ

[D.C.A. (Coomaraswamy J.) November 1, 1984]
[Singapore – District Court Appeal No. 24 of 1984]

Family Law – Maintenance – Enforcement order for payment of arrears – Factors to be taken into account in deciding how far back arrears should be ordered – Women's Charter (Cap. 47), ss. 61 & 109.

English Law – When binding in Singapore

The appellant applied for an enforcement order for payment of arrears of maintenance which totalled $6,230.00 from the date of default, i.e. from December 1981. The learned Magistrate after hearing evidence of the parties considered it appropriate to enforce only one year's maintenance totalling $2,760.00. He expressly stated that his order "does not release him (the former husband) from his liability to pay so long as the order remained in force".

The appellant appealed against the order of restriction of arrears.

Held: (1) a Singapore magistrate acting under section 61 of the Women's Charter has jurisdiction to order the payment of arrears of more than one year from the date of the complaint;

(2) the learned magistrate appeared to have been influenced by the fact that his decision would not bar the appellant from bringing a civil suit for any balance of arrears of maintenance due to her. In this context, a multiplicity of proceedings was not desirable, particularly where a party was resident abroad;

(3) Justice would best be done by remitting this case back to the magistrate so that he may decide how far back he should order arrears from the date of the complaint. He should do so without being bound by any English fetter of practice or custom of not ordering arrears beyond one year.

Obiter dictum: "The binding nature of English cases must be looked at against the context of the topic of law in question. Where under the provisions of our law the law of England is made the law in Singapore, courts in Singapore will feel bound by and apply the decisions of English courts in exactly the same way as a corresponding court in England would. This is of course subject to any provisions in Singapore statute making the law of England applicable in Singapore. An example of such a law is section 5 of the Civil Law Act, Chapter 30."

Cases referred to:

(1) *Pilcher* v. *Pilcher (No. 2)* [1956] 1 W.L.R. 298; [1956] 1 All E.R. 463.

(2) *Luscombe* v. *Luscombe* [1962] 1 W.L.R. 313; [1962] 1 All E.R. 668.

(3) *Amrick Lall* v. *Sowbaiavati* [1973] 2 M.L.J. 191.

(4) *Ross* v. *Pearson* [1976] 1 W.L.R. 224; [1976] 1 All E.R. 790.

DISTRICT COURT APPEAL.

Mrs. Janis Woon (Asst. Director of Legal aid) for the appellant.

Respondent in person.

Cur. Adv. Vult.

Coomaraswamy J.: In the proceedings now appealed from, there were three applications, but only one need concern me. Arising from the default under a Magistrate's varied maintenance order of $230 per month against her former husband, the respondent, Mrs. Gomez the appellant before me applied to a Magistrate for an enforcement order for payment of arrears from the date of the default, i.e. from December 1981. Her complaint was filed on January 3, 1984 and the arrears then due totalled $6,230. The learned Magistrate after hearing evidence of the parties "considered it appropriate to enforce only one year's maintenance totalling $2,760". He made the point that he did not remit the balance of arrears outstanding, implying thereby that the former wife could recover the difference as a civil debt. In fact, he expressly stated that his order "does not release him (the former husband) from his liability to pay so long as the order remained in force".

It is against the restriction of arrears, using the terminology of the English courts, to "one year backwards" apparently from the end of the month (April 1984) in which the order was made that the appellant now appeals.

In coming to his decision, the learned Magistrate said that the "respondent's failure to pay under the variation order was not wilful but due to his difficult circumstances". He further considered that "for more than two years Mrs Gomez did nothing to enforce payment," thereby causing the arrears to accumulate to $6,230 at the time of the complaint.

In restricting himself to one year's arrears, the learned Magistrate adopted apparently as binding on him the practice (in some cases called a "custom") of the English courts as laid down, amongst others, in the cases of *Pilcher* v. *Pilcher (No. 2)*[1] and of *Luscombe* v. *Luscombe*[2].

These cases were referred to and followed in the Malaysian case of *Amrick Lall* v. *Sowbaiavati*[3]. The learned Magistrate said he believed the English and Malaysian practice was also being applied in the Singapore courts.

Light on the *Pilcher* and *Luscombe* cases is shed by *Ross* v. *Pearson*[4]. Here, an order by Magistrates for arrears of maintenance came up for review by way of case stated before the Family Division. Baker, P. quoted Lord Merriman in the *Pilcher* case:–

> Moreover, as a matter of practice but not of law courts which are asked to enforce orders of this sort, usually consider that there should be a time limit retrospectively. The custom in this Division is not to enforce arrears for more than a year backwards.

Baker, P. emphasized Lord Merriman's use of the word "usually". Later on, Baker, P. went on to say:–

> This is not a matter for which there is a rule of law; it is a rule of practice which is 'usually' followed. The court can consider whether in the circumstances of any given case it is right to follow the practice either in whole or in part.

He stressed this further, when later in his judgment he said that the one-year limitation was merely a matter of practice, "there being no rule of law".

Latey, J. in agreeing with Baker, P. said:–

> I would not want this decision to be taken by magistrates' courts as an indication that there was a universal absolute rule that justices should never go back further than the last year's arrears.

The Magistrate said that "there was nothing in the Women's Charter, Chapter 47 to negate the longstanding common law practice" of England.

The binding nature of English cases must be looked at against the context of the topic of law in question. Where under the provisions of our law the law of England is made the law in Singapore, courts in Singapore will feel bound by and apply the decisions of English courts in exactly the same way as a corresponding court in England would. This is of course subject to any provisions in the Singapore statute making the law of England applicable in Singapore. An example of such a law is section 5 of the Civil Law Act, Chapter 30.

On arrears under orders for the payment of affiliation [or maintenance], section 76 of the English Magistrates' Courts Act of 1952 gives magistrates the express power to remit arrears.

There is no such provision in Singapore. By section 13(1) of the English Matrimonial Proceedings (Magistrates' Courts) Act, 1960 (and corresponding earlier legislation), a magistrate's order for the payment of maintenance is, for purposes of enforcement, equated with an affiliation order. An English court declining to order payment of arrears for more than one year backwards in effect remits part of the sum due under the order if on the date of the order, there are more than 12 months' payment in arrears. Our magistrates have no such powers of remission and this was recognised by the learned Magistrate.

The English practice or custom has since 1970 received statutory sanction by virtue of section 32 of the Matrimonial Proceedings and Property Act of that year. This Act amended section 13 of the Matrimonial Proceedings (Magistrates' Courts) Act of 1960 by adding subsections (5) to (7). Subsection (5) reads:–

> A person shall not be entitled to enforce through the High Court or any county court the payment of any arrears due under an order made by virtue of this Act without the leave of that court if those arrears became due more than twelve months before proceedings to enforce the payment of them are begun.

Since 1970, in England, magistrates cannot order arrears of maintenance for more than one year backwards without leave of the High Court or a county court.

It is my view that the English cases of *Pilcher* and *Luscombe* should not be followed in Singapore on the point of any rigid practice (if such be the case) of one year backwards. In any event, *Ross* v. *Pearson*, decided after the 1970 amendment to the Matrimonial Proceedings (Magistrates' Courts) Act of 1960, has considerably qualified those two cases.

The learned Magistrate was referred to section 109 of the Women's Charter which deals with the recovery of arrears of unsecured maintenance and provides that such arrears shall be recoverable as a debt from the defaulter. Such arrears shall be provable in bankruptcy if the defaulter becomes a bankrupt or where accrued due before his death can be recovered from his estate. Section 109(3) disallows the civil recovery of maintenance if it is accrued due more than three years before the institution of the suit.

The learned Magistrate sought to make a distinction for the purposes of the proceedings before him between a civil debt and proceedings for recovery of arrears in the subordinate courts, where amongst the sanctions are penal provisions.

However, in my view, section 109(3), while admittedly restricted to recovery of arrears by way of a civil debt, is indicative of the broad intention of the legislature as to time limits. It is therefore my view that a Singapore magistrate, acting under section 61 of the Women's Charter has jurisdiction to order the payment of arrears of more than one year from the date of the complaint. It may well be that he cannot go more than three years backwards but that question is not before me.

Although it is my view that the English practice, considerably weakened after *Ross* v. *Pearson*, of restriction to one year's arrears does not apply in Singapore, the grounds on which the English courts in practice limit themselves to ordering arrears only to a particular period "backwards" have validity in Singapore. A study of the English cases shows that in deciding how far back arrears should be ordered, a court should take into account, where appropriate, the following factors:–

(a) the fact that the sums ordered are for maintenance and do not constitute property to be hoarded;

(b) the situation and conduct of the parties;

(c) the nature and causes of the applicant's inaction or acquiescence;

(d) the question of hardship on the respondent;

(e) the large sum that may have accrued when the respondent believed that there was no liability to pay;

(f) that it is always preferable to have in force an order for such a sum as the respondent will pay rather than go to prison.

In my view, these grounds are not exhaustive. In the case on appeal, there was a factor which, to my mind, also constitutes a valid ground under (c) above. The appellant in this case was residing in India as was her daughter who is also a beneficiary of the maintenance order. Her means and the attendant difficulties of coming to Singapore to seek enforcement under a Magistrate's order (or even to claim arrears in a civil suit) are also

grounds that should be taken into account in deciding how far back arrears will be awarded. On this aspect, the learned Magistrate said no more than that Mrs. Gomez "for more than two years did nothing to enforce payment". He did not direct his mind to her permanent residence in India, the necessity to come to Singapore to seek enforcement and the attendant cost and difficulties.

The learned Magistrate also appears to have been influenced by the fact that his decision will not bar the appellant from bringing a civil suit for any balance of arrears of maintenance due to her. All I need to say in this context is that a multiplicity of proceedings is not desirable, particularly where a party is resident abroad.

In the light of what I have said, justice will best be done by my remitting this case back to the Magistrate so that he may decide how far back he should order arrears from the date of the complaint. He should do so without being bound by any English fetter of practice or custom of not ordering arrears beyond one year.

Order accordingly.

Solicitors: *Director of Legal Aid.*

MALAYSIAN REPORTS

NGOOI KU SIONG & ANOR. V. AIDI ABDULLAH

[F.C. (Lee Hun Hoe C.J. (Borneo), Seah and Syed Agil Barakbah F.JJ.) February 6 & June 11, 1984]

[Kuala Lumpur – Federal Court Civil Appeal No. 234 of 1983]

Tort – Action for negligence – Damages – Damages for pain and suffering and loss of amenities – Facial injuries, fracture and neck injuries – Damages for future earnings and/or loss of earning capacity – General and not special damages – No necessity that they be specially pleaded.

Damages – Facial injuries, fracture and neck injuries.

The respondent was riding a motorcycle in Petaling Jaya when he was knocked down by a motor lorry driven by the first appellant as the servant of the second appellant, after the lorry had emerged from a minor road. The respondent sustained facial and neck injuries, a compound fracture and minor bruises. The learned trial judge made separate awards for the fractures and the facial injuries for which she awarded at the sum of $31,500/- but deducted $5,500/- for overlapping and awarded $26,000/- as damages. In regard to the neck injuries the learned trial judge applied her experience in adjudicating cases of this nature and awarded a global sum of $40,000/- as damages. The learned trial judge held that loss of future earnings and loss of earning capacity were items of special damages which the respondent was only entitled to claim provided they were specifically pleaded. After going through the evidence she held that the respondent was not entitled to loss of future earnings or loss of earning capacity. The appellants appealed on the ground that the award of the learned trial judge was manifestly excessive and not in keeping with the trend of authorities. The respondent cross-appealed against the refusal of the learned judge to award him damages for loss of future earnings and/or loss of earning capacity.

Held: (1) the fractures and the other connected injuries in this case should be assessed together and not separately and then just added up at the end because they are not separate heads of compensation. Although the principle applied by the learned judge was incorrect, the award of $26,000/- under this head was in no way manifestly excessive or unreasonable;

(2) in regard to the neck injuries, it was not proper for the learned judge to discard the authorities and use her own experience in assessing the damages. Experience alone however long without resorting to comparable cases which are the best guides, may result in speculation. The award of $40,000/- was erroneous and manifestly excessive and $22,000/- would be a fair and reasonable award;

(3) both loss of future earnings and loss of earning capacity are items of general damages which need not be specifically pleaded. It was sufficient for the respondent to aver "And The Plaintiff prays for general damages" in his pleadings;

(4) on the evidence in this case the respondent was not